Supreme Court, U.S.
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No. 96-774

In The

Supreme Court of the United States

October Term, 1996

ARTHUR E. GERTH,

Petitioner,

vs.

SEARS, ROEBUCK & COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The Petitioner is Arthur E. Gerth.

The Respondent is correctly identified in the caption as Sears, Roebuck & Company. Richard G. Griffith of Stites & Harbison is counsel of record for Respondent Sears, Roebuck & Company. Jeffrey J. Chapuran of Stites & Harbison is also counsel for Respondent Sears, Roebuck & Company.

RULE 29.6 DISCLOSURES

Pursuant to Supreme Court Rule 29.6, Sears, Roebuck & Company discloses the following nonwholly owned subsidiaries: Maxserv., Inc.; Sears Canada Inc.; and Sears, Roebuck de Mexico, S.A. de C.V.

TABLE OF CONTENTS

Page

List of Interested Parties i

Rule 29.6 Disclosures i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Statute Involved 1

Counterstatement of the Case 1

A. Course of Proceedings and Disposition of the Case Below. 1

B. Correction of Misstatements in the Petition. ... 2

Reasons for Denying the Writ 5

I. The Petitioner seeks review of a question never passed on by the courts below. 5

II. There is not a split of authority on the issue raised in the petition. 7

A. The Sixth Circuit Court of Appeals has consistently evaluated an employee's performance as part of the *prima facie* case. 8

Contents

Page

B. There is no conflict between the decision below and any decision of any other federal court of appeals as to the proper application of the *McDonnell Douglas prima facie* case. 9

1. The majority of the cases cited in the petition simply do not make the "holding" attributed to them by the Petitioner. 10

2. Other cases cited in the petition properly consider "subjective evaluations of job performance" during the *prima facie* case. 12

3. Many of the "conflicting" cases cited in the petition actually affirm summary judgment for the employer. 14

III. Any conflict which may exist results from differing applications of a properly stated rule of law. 14

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Adickes v. Kress & Co., 398 U.S. 144 (1970) 5

Contents

Page

Alphin v. Sears, Roebuck & Co., 940 F.2d 1497 (11th Cir. 1991) 13

Baker v. Sears, Roebuck & Co., 903 F.2d 1515 (11th Cir. 1990) 13

Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326 (3rd Cir. 1995) 13

Danielson v. City of Lorain, 938 F.2d 681 (6th Cir. 1991) 8, 9

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) . 5

Duart v. FMC Wyoming Corp., 72 F.3d 117 (10th Cir. 1995) 11, 14

E.E.O.C. v. Insurance Co. of North America, 49 F.3d 1418 (9th Cir. 1995) 11, 14

Graver Tank & Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) 4

Harker v. Federal Land Bank of Louisville, 679 S.W. 2d 226 (Ky. 1984) 6

Hartsel v. Keys, 87 F.3d 795 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3267 (U.S. Oct. 10, 1996) 8, 9

Huhn v. Koehring Co., 718 F.2d 239 (7th Cir. 1983) .. 8, 13

Contents

Page

Lehman v. Prudential Ins. Co. of America, 74 F.3d 323 (1st Cir. 1996) 10, 11, 14

Marx v. Schnuck Markets, Inc., 76 F.3d 324 (10th Cir.), *cert. denied*, __ U.S. __, 135 L. Ed. 2d 1071, 116 S. Ct. 1552 (1996) 11, 14

McDonald v. Union Camp Corp., 898 F.2d 1155 (6th Cir. 1990) 6, 8, 13

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 6, 7, 9, 14, 15

Menard v. First Sec. Servs. Corp., 848 F.2d 281 (1st Cir. 1988) 13

Miller v. Butcher Distributors, 89 F.3d 265 (5th Cir. 1996) 12

Neufeld v. Searle Laboratories, 884 F.2d 335 (8th Cir. 1989) 9, 12

Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796 (6th Cir. 1994) 6

Ramsey v. United Mine Workers, 401 U.S. 302 (1971) 5

Rothmeier v. Investment Advisors, Inc., 85 F.3d 1328 (8th Cir. 1995) 11, 14

Contents

Page

Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106 (5th Cir. 1995) 12

Spangle v. Valley Forge Sewer Authority, 839 F.2d 171 (3rd Cir. 1988) 13

Spulak v. K Mart Corp., 894 F.2d 1150 (10th Cir. 1990) 12, 13

Sutera v. Schering Corp., 73 F.3d 13 (2nd Cir. 1995) 13

United States v. Lorenzetti, 467 U.S. 167 (1984) 9

United States v. Ortiz, 422 U.S. 891 (1975) 5

United States v. Williams, 504 U.S. 36 (1992) 5

Wohl v. Spectrum Manufacturing, Inc., 94 F.3d 353 (7th Cir. 1996) 11

Rules Cited:

Supreme Court Rule 10 ..... 7, 15

Supreme Court Rule 10(a) 7

Supreme Court Rule 15.2 2

Contents

Page

Statutes Cited:

Ky. Rev. Stat. Ann. Chapter 344 6

Ky. Rev. Stat. Ann. Section 344.040 1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished by order of the Sixth Circuit and is reprinted as Appendix B to the petition. The decision of the United States District Court for the Eastern District of Kentucky, also unpublished, was entered on December 12, 1994 and is reprinted as Appendix A to the petition.

STATUTE INVOLVED

Kentucky Rev. Stat. Ann. Section 344.040 is reprinted as Appendix C to the petition.

COUNTERSTATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

As stated in the petition, this action was filed in the Fayette Circuit Court on July 27, 1993. In his Complaint, the Petitioner alleges that Sears, Roebuck & Company ("Sears") unlawfully discriminated against him because of his age, in violation of the Kentucky Civil Rights Act, Ky. Rev. Stat. Ann. Section 344.040.[1] Based on diversity of citizenship, Sears removed this action to the United States District Court for the Eastern District of Kentucky.

On December 12, 1994, after the issue was extensively briefed by both parties, the District Court sustained Sears' Motion for Summary Judgment. In a well-reasoned and

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1. On December 29, 1993, Petitioner's Complaint was amended to include a common law claim for "wrongful discharge." The District Court held that the Petitioner's "wrongful discharge" claim failed as a matter of law. The dismissal of this claim has not been challenged subsequent to the District Court's dismissal.

thorough opinion, the District Court concluded that the Petitioner had not proved a *prima facie* case of age discrimination because he had admitted that he failed to meet Sears' sales goals and was therefore not qualified for his sales associate position. In the alternative, the District Court further concluded that even if the Petitioner could prove a *prima facie* case, he could not establish that Sears' legitimate, nondiscriminatory reason for the Petitioner's discharge was pretextual.

On appeal to the Sixth Circuit, the Petitioner *did not* contend that the District Court erred by considering the employer's subjective view of the Petitioner's performance at the *prima facie* stage of the case. Rather, the Petitioner urged that he was in fact qualified for his position and that Sears made "too big a deal" out of his failure to meet its sales goals. The Sixth Circuit appropriately rejected this argument and, citing the Petitioner's admission that he was not performing to the satisfaction of Sears' management, affirmed the District Court's ruling.

B. Correction of Misstatements in the Petition.

The opinions of the District Court and the Court of Appeals correctly and adequately set forth the facts of this case. These opinions accurately highlight the Petitioner's consistent failure to meet Sears' sales goals. In the interest of brevity, the Respondent respectfully directs the Court's attention to these opinions.

Pursuant to United States Supreme Court Rule 15.2, the Respondent brings to the Court's attention the following misstatements of fact contained in the petition.

The Petitioner incorrectly states that he "consistently" received marks of "meets expectation" or better on "all" of his performance evaluations. (Petition at 2). In fact, the Petitioner's

inability to sell maintenance agreements is well documented. On his 1993 annual sales associate evaluation, for example, the Petitioner received a "far below expectation" ranking for his maintenance agreement sales.

The Petitioner also incorrectly characterizes his performance in the appliance department as "excellent." (Petition at 2). Again, the Petitioner's performance inadequacies are amply documented. As detailed in the District Court's opinion, the Petitioner was called in for a number of "deficiency interviews" and told to increase his monthly sales of maintenance agreements. (Op. at A-4 to A-5). In addition to his 1993 evaluation, the Petitioner was given written warnings concerning his inability to sell maintenance agreements — and told that he could not continue to work in the appliance department if he did not improve — in October of 1992 and twice in March of 1993. (Op. at A-5).

Although the Petitioner contends that his total maintenance agreement sales were adequate relative to other employees, it is significant that Sears assessed an employee's performance by analyzing their "MA percentage" (the ratio of maintenance agreement sales to merchandise sales) and not by counting their gross maintenance agreement sales. In October of 1992, Petitioner received a deficiency review warning him that his MA percentage was the *lowest of any sales associate in the Home Appliance Department.* Five months later the Petitioner's MA percentage had not increased and the Petitioner received another deficiency warning noting that his MA percentage for the month of January 1993 ranked *8th out of 10 employees in the Home Appliance Department.* This deficiency warning also noted that of all of the sales associates, only the Petitioner failed to increase his MA percentage in February of 1993.

Further, in comparing his performance to other employees,

all of whom either worked in different departments and/or were part-time employees, the Petitioner fails to note that both the District Court and the Sixth Circuit ruled that these employees were not "similarly situated" and were inappropriately characterized by the Petitioner as "comparable." *See* Op. at A-10 to A-11 (Dist. Court); Op. at B-5 (Ct. of Appeals). In fact, the Sixth Circuit correctly stated that the Petitioner's comparisons were "rightfully discounted" by the District Court. (Op. at B-8).

Likewise, the Petitioner omits the fact that his replacement was previously employed on a part-time basis. As the courts below emphasized, that employee's performance statistics are simply not "comparable" to those of the Petitioner, a full-time employee. The petition does not seek review of the lower courts' findings that the Petitioner failed to identify truly comparable employees. In light of these conclusive findings, the Petitioner's attempt to re-argue this issue is wholly inappropriate. *See Graver Tank & Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

Finally, the Petitioner contends that he produced "proof" that Sears employees were pressured into early retirement. (Petition at 3). This "proof" consists of two affidavits from former Sears employees containing personal opinions as to Sears' motivation for offering early retirement to certain employees. As the Sixth Circuit recognized, neither affiant produced any evidence that Sears discriminated against older employees and the affidavits produced by the Petitioner are not appropriately considered probative. (Op. at B-9).

REASONS FOR DENYING THE WRIT

The Respondent respectfully opposes the petition for writ of certiorari. First, the Petitioner seeks review of a question never presented to the courts below. Second, the Petitioner cites a "conflict" among the Circuit Courts of Appeals where no conflict in fact exists. Finally, the Petitioner does not contend that the Sixth Circuit improperly stated the law. At most, the Petitioner seeks a determination that the Sixth Circuit misapplied the law and improperly evaluated the evidence. The time for such an argument has long since passed and this Court should deny review.

I.

THE PETITIONER SEEKS REVIEW OF A QUESTION NEVER PASSED ON BY THE COURTS BELOW.

With very few exceptions, this Court wisely refuses to review issues neither "pressed nor passed upon below." *United States v. Williams*, 504 U.S. 36, 40 (1992). *See also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In this Court, for the first time, the Petitioner argues that evidence regarding an employee's inadequate job performance is not properly considered as part of the *prima facie* case of age discrimination and may be considered only at the "pretext" stage by the factfinder. (Petition at i).

Yet despite the benefit of having filed three (3) memoranda in opposition to the Respondent's motion for summary judgment

in the District Court, as well as a brief in the Sixth Circuit, the Petitioner did not raise this issue until he filed his petition for a writ of certiorari. In fact, in both lower courts, the Petitioner attempted to prove a *prima facie* case by arguing that his performance evaluations and his gross maintenance agreement sales figures *established that he was qualified for his position.* Having unsuccessfully argued that these "subjective views" of his job performance conclusively *established* a *prima facie* case, the Petitioner cannot now claim that the lower courts erred by considering this evidence as part of the *prima facie* case.

While certainly not surprising in light of the Petitioner's failure to raise this issue, neither of the lower courts expressly addressed the legal question of whether performance evaluations may be considered as part of the *prima facie* case. Both the District Court and the Sixth Circuit decisions rest on findings that the Petitioner failed to prove a *prima facie* case of age discrimination under either the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973),[2] and its progeny, or the alternative test adopted by the Sixth Circuit in *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1161 (6th Cir. 1989). Rather than arguing that the courts were misapplying the *McDonnell Douglas* test, as he contends in this Court, the Petitioner unsuccessfully argued to both lower courts that his evidence, which included "subjective performance reviews," established that he was qualified for his position and that he met all of the elements required to prove a *McDonnell Douglas prima facie* case.

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2. Although this case arises under the Kentucky Civil Rights Act, Ky. Rev. Stat. Ann. Chapter 344, courts resolve claims under the Kentucky Civil Rights Act by applying the same three-step analysis used by the Federal Courts in cases arising under Federal law. *See Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 n. 8 (6th Cir. 1994); *Harker v. Federal Land Bank of Louisville*, 679 S.W. 2d 226 (Ky. 1984).

In view of this Court's unwillingness to hear arguments on questions not raised below, the petition must be denied. This result is especially appropriate in cases, such as this one, in which the Petitioner not only fails to argue below that the courts misapplied the law, but consistently acquiesces in that "misapplication."

II.

THERE IS NOT A SPLIT OF AUTHORITY ON THE ISSUE RAISED IN THE PETITION.

It is a familiar proposition that a petition for a writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. In cases such as the present one, this normally requires, at a minimum, that "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." Sup. Ct. R. 10(a).

The issue raised in the petition fails to satisfy this Court's stringent requirements for granting a writ of certiorari. Unquestionably, proof that an employee is qualified is essential to a *prima facie* case of employment discrimination under the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). An examination of the cases cited by the Petitioner reveals that courts have consistently applied *McDonnell Douglas* and any conflict on the issue of whether or not job performance is relevant to an employee's qualification is truly illusory.

In fact, contrary to the argument raised by the petition, the federal circuit courts simply have not addressed the issue raised in the petition — and the cases cited by the Petitioner do not "hold" that it is error to consider job performance at the *prima facie* stage of proof. To the extent that courts have *discussed*

the issue of whether or not an employee is "qualified" for his or her position, they have consistently and uniformly considered job performance evaluations to be relevant to a determination of the issue. Accordingly, review by this Court is unnecessary and the petition should be denied.

A. The Sixth Circuit Court of Appeals has consistently evaluated an employee's performance as part of the *prima facie* case.

The Sixth Circuit correctly determined that the Petitioner's candid admission that he was not meeting the legitimate performance standards established by the Respondent prevented him from proving that he was qualified for his position.[3] (Op. at B-4). In so holding, the Court of Appeals simply confirmed its unwavering support for the long-standing proposition that an employment discrimination plaintiff "must prove that he was performing his job 'at a level which met his employer's legitimate expectations.' " *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990), *quoting Huhn v. Koehring*, 718 F.2d 239, 243 (7th Cir. 1983).

Despite the Sixth Circuit's uniform interpretation of the "qualified" prong of the *McDonnell Douglas prima facie* case, the Petitioner attempts to create a conflict by stating that in both *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3267 (U.S. Oct. 10, 1996) (No. 96-486), and *Danielson v. City of Lorain*, 938 F.2d 681 (6th Cir. 1991), the Sixth Circuit "found" that a *prima facie* case had been proved

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3 . Without citing to the court below, the Petitioner makes the curious assertion that "the Court made a credibility-assessment of actual job performance at the *prima facie* stage of proof." (Petition at 4). It is not entirely clear whose credibility was being assessed by the Court of Appeals: the *Petitioner himself* stated that he did not perform to his employer's satisfaction. *See* Op. at B-4.

and considered job performance only at the pretext stage. (Petition at 4-5). In fact, the Court did not make such a "finding" and did not consider the question raised in the petition *in either case*. In *Hartsel*, the Sixth Circuit *refused to consider* the lower court's finding that a *prima facie* case had been proved. *Hartsel*, 87 F.3d at 800. In *Danielson*, the court *assumed arguendo* that a *prima facie* case had been proved and declined to discuss the elements of *prima facie* case. *Danielson*, 938 F.2d at 683.[4] There simply cannot be a "conflict" as to the proper application of the elements of a *prima facie* case, as the Petitioner contends, when the cases cited in the petition *do not address the elements of a prima facie case*. Unquestionably, there is no split of authority within the Sixth Circuit on the issue raised in the petition.

B. There is no conflict between the decision below and any decision of any other federal court of appeals as to the proper application of the *McDonnell Douglas prima facie* case.

The Petitioner further predicates his request for a writ of certiorari on a split of authority among the federal circuits. This Court rarely grants review unless the decision sought to be reviewed is "squarely inconsistent" with decisions of other courts of appeals on an important issue of federal law. *United States v. Lorenzetti*, 467 U.S. 167, 173 (1984). By pointing to "holdings" that do not exist and citing "findings" that are not actually made, the Petitioner valiantly attempts to create a split of authority on the issue raised by the petition.

A review of the "conflicting" decisions cited in the petition, however, reveals that the courts of appeals simply have not addressed the issue of whether an employee's subjective

4. Interestingly, the *Danielson* court does note that a discrimination plaintiff may not be successful unless she performs her job at a level which "met the employer's legitimate expectations." *Id.* at 684, *citing Neufeld v. Searle Laboratories*, 884 F.2d 335, 339 (8th Cir. 1989).

performance evaluations are properly considered at the *prima facie* stage of proof in employment discrimination cases. Notably, many of the "conflicting" decisions actually grant summary judgment for the employer and are therefore quite consistent with the Sixth Circuit's decision in this case. Still others find for the employee, but apply the same analysis as that applied by the Sixth Circuit below. In short, the Petitioner's efforts to create a conflict prove futile, and this is yet another case in which the lower courts are in harmony and review is unwarranted.

1. The majority of the cases cited in the petition simply do not make the "holding" attributed to them by the Petitioner.

The Petitioner attributes error to the Sixth Circuit's decision[5] to consider his performance problems at the *prima facie* stage of his case. Seeking to create a conflict on this issue, the Petitioner cites to a number of cases for the proposition that most circuits have "held" that such evidence is properly considered as part of the "pretext" analysis rather than as part of the *prima facie* case. Yet none of the cases cited by the Petitioner even address the issue raised in the petition. In fact, the majority of the cases cited in the petition do not even consider the type of proof required to prove a *prima facie* case of age discrimination. How these cases can "hold" that it is error to consider job performance as part of the *prima facie* case when they do not even address the *prima facie* case is somewhat perplexing.

In *Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323 (1st Cir. 1996), for example, the First Circuit refused to discuss the elements of a prima facie case, stating that "[s]ince we find

5. Of course, the Sixth Circuit never in fact made a "decision" as to this issue because it was never raised below.

the plaintiff did not meet his burden . . . of establishing pretext, we need not tarry over the prima facie case issue." *Id.* at 328. In view of its failure to address the *prima facie* case, it is apparent that the Petitioner's contention that the First Circuit "agreed" on a conflicting interpretation of the qualification element of the *prima facie* case is incorrect. (Petition at 5).

Likewise, in *E.E.O.C. v. Insurance Co. of North America*, 49 F.3d 1418 (9th Cir. 1995), the Ninth Circuit addressed whether or not an applicant was appropriately rejected as being "overqualified" for a position. Because the parties agreed that the applicant met the qualifications for the job, there was not a dispute as to whether or not he was "qualified." Indeed, the court *could not have* discussed the proper use of "subjective evaluations of job performance" in *Insurance Co. of North America* because the fact that the plaintiff had not been hired precluded any evaluation of his performance.

Other cases cited in the petition similarly fail to analyze the *prima facie* case and certainly do not make the broad "holdings" attributed to them by the Petitioner. *See Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1332 (8th Cir. 1995) (employer concedes *prima facie* case); *Duart v. FMC Wyoming Corp.*, 72 F.3d 117 (10th Cir. 1995) (court considers issue of after-acquired evidence and does not discuss requirements for *prima facie* case); *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324 (10th Cir.) (court discusses "pretext" analysis and does not analyze *prima facie* case), *cert. denied*, __ U.S. __, 135 L. Ed. 2d 1071, 116 S. Ct. 1552 (1996); *Wohl v. Spectrum Manufacturing, Inc.*, 94 F.3d 353, 354-55 (7th Cir. 1996) (sole issue raised by the appellant is whether Spectrum's proffered reason for firing was a lie).

Further, a number of cases cited in the petition do not arise in the context of a summary judgment, but on post-trial motions

following jury verdicts. Thus, for example, the question before the Fifth Circuit in *Miller v. Butcher Distributors*, 89 F.3d 265 (5th Cir. 1996), was whether the evidence supported a jury verdict in favor of the terminated employee. The court addressed the elements of a *prima facie* case only in view of this standard of review, noting that " '[w]hen an employment discrimination case reaches the fact finder, the pertinent inquiry is whether the plaintiff has proven discrimination, *not whether he has made a prima facie case*.' " *Id.* at 267 (emphasis supplied), *quoting Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1110 (5th Cir. 1995). *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), and *Neufeld v. Searle Laboratories*, 884 F.2d 335 (8th Cir. 1989), likewise arise in the context of post-trial motions and after a discussion of the *prima facie* case becomes irrelevant.

Thus, the Petitioner's contention that these cases contain "holdings" inconsistent with those of the Sixth Circuit on the issue of whether or not job performance evaluations are properly considered as part of the *prima facie* case of age discrimination is patently wrong. Not only do these cases fail to discuss the issue raised by the petition, but, *without exception*, they fail to make any holdings at all with respect to evidence appropriately considered during the *prima facie* case.

2. Other cases cited in the petition properly consider "subjective evaluations of job performance" during the prima facie case.

Perhaps more surprising is the number of cases cited by the Petitioner in which the court *expressly considers job performance evaluations* in determining whether or not the employee has proven that he was "qualified" for his position. To the extent that these cases "rule" on the issue raised in the petition, they are completely consistent with the approach taken by the Sixth Circuit in this case.

In *Sutera v. Schering Corp.*, 73 F.3d 13 (2nd Cir. 1995), the Second Circuit found that the plaintiff was qualified for his position, in part, because the plaintiff received "numerous awards for excellent performance." *Id.* at 16. Certainly, the Petitioner cannot suggest that "performance awards" are anything other than a subjective measure of job performance.

Similarly, in *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326 (3rd Cir. 1995), the court determined that the plaintiff was "qualified" for his position, in part, because "[d]uring his last five years on the job, he received overall evaluations that translated into 'competent' by Quaker State's performance standards." *Id.* at 330. *See also Spulak v. K Mart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990) (employee was qualified because he was rated "average" or "above average" on performance reviews and received merit pay increases); *Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497 (11th Cir. 1991) (employee was qualified because of his history of favorable job evaluations and positive comments by co-workers).

In fact, in addition to the cases noted above, cases in which courts properly look to an employee's performance in order to determine if the employee is "qualified" are legion. *See, e.g., Baker v. Sears, Roebuck & Co.*, 903 F.2d 1515, 1520-21 (11th Cir. 1990) (Sears employee not qualified for position where she failed to sell requisite amount of maintenance agreements); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990) (employee's performance problems precluded him from demonstrating that he was "qualified"); *Huhn v. Koehring Co.*, 718 F.2d 239 (7th Cir. 1983) (same); *Menard v. First Sec. Servs. Corp.*, 848 F.2d 281 (1st Cir. 1988) (same); *Spangle v. Valley Forge Sewer Authority*, 839 F.2d 171 (3rd Cir. 1988) (same). Because the approach taken by the court below does not differ from the approach consistently taken by other courts of appeals, there is no split of authority on the issue raised in the petition and this Court must deny review.

3. Many of the "conflicting" cases cited in the petition actually affirm summary judgment for the employer.

Finally, it is noteworthy that many of the cases cited for the proposition that a "clear and irreconcilable" conflict exists affirm summary judgment for the *employer*. *See Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323 (1st Cir. 1996); *Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328 (8th Cir. 1995); *E.E.O.C. v. Insurance Co. of North America*, 49 F.3d 1418 (9th Cir. 1995); *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324 (10th Cir.), *cert. denied*, __ U.S. __, 135 L. Ed. 2d 1071, 116 S. Ct. 1552 (1996); *Duart v. FMC Wyoming Corp.*, 72 F.3d 117 (10th Cir. 1995). It seems highly incredulous for the Petitioner to claim that the "holdings" in these cases "conflict" with that of the Sixth Circuit in this case when, in fact, all affirm summary judgment for the employer.

In short, none of the cases cited in the petition conflict with the Sixth Circuit's decision below. Indeed, none of the decisions even address the issue raised, for the first time, in the petition. Even assuming that these decisions impliedly address whether an employee's job performance is appropriately considered as part of the *prima facie* case, it is abundantly clear that the federal circuits do not differ on their application of the *McDonnell Douglas* test. Accordingly, this Court should deny review of the Sixth Circuit's well-founded decision.

III.

ANY CONFLICT WHICH MAY EXIST RESULTS FROM DIFFERING APPLICATIONS OF A PROPERLY STATED RULE OF LAW.

It has been this Court's practice to deny review when the federal courts properly state the law, but differ in their approach

to evaluating the evidence and facts particular to each case. Indeed, Supreme Court Rule 10 clearly provides, in part, that a petition is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Even assuming that the issue stated in the petition was raised below, and that there is a split of authority in the courts of appeals, the Petitioner does not contend that the court below misstated the law applicable to this case. Indeed, the Sixth Circuit properly set forth the three-part framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). *See* Op. at B-3. At most, therefore, the error asserted by the Petitioner consists of a "misapplication" of the *McDonnell Douglas* test. (*See* Petition at 8 "The other Circuits are in conflict concerning how to consistently interpret and apply *McDonnell Douglas* and *St. Mary's*."). Unquestionably, review of this "error" is unneccesary and unwarranted.

CONCLUSION

For the foregoing reasons, this Court should deny review of the Sixth Circuit's decision.

Respectfully submitted,

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